on to contend that "house or building" in paragraph (b) of the first proviso meant a completed house or building. I do not think that the legislature intended "house or building" to bear different meanings in the same definition. As I have already stated, I do not propose to give any decision on the correctness, or otherwise, of her contention as it would now be otiose in view of the fact that I have decided that the respondents are not liable as owners of the land in category A.

Counsel for the chief assessor contended that section 18 of the Ordinance supported his view. Section 18 however deals with tax in respect of a new building on which tax is payable from the date of completion of the work of erecting such building. It is silent on the question of the position with regard to the land whilst buildings are in the course of erection thereon.

It seems to me that the law, on the whole, prior to 1st January, 1966, is not entirely free from doubt on this question and that the amending Act of 1965, which came into force on that date, removed that doubt by providing a new definition of "annual value" which now empowers the chief assessor to hitch his assessment to the estimated value of the land as if it were vacant land with no buildings being erected thereon.

I now turn to the only property in category B which the respondents own i.e. 21 Cuscaden Road.

This property is rent controlled and is vacant. It has not been demolished and no material change had taken place with regard to it at the time the proposal to amend its annual value was made. The decision in the case of *Port of Spain Corporation* v. *Gordon, Grant & Co. Ltd.*[7] is, in my view, apposite so as to tie the annual value to the standard rent of controlled premises because that is the only rent which the law allows him to receive.

In my opinion the chief assessor was somewhat precipitate in his action and the conclusion of the board must therefore be maintained i.e. that the annual value cannot be raised.

With regard to Thomson Rise Estate which is the only property in category C which is owned by the respondents, I am of the opinion that the board should have ascertained the capital value of that portion of this land which is capable of development. The land and buildings, including those erected by squatters, were purchased for $700,000 which coincides with the valuation set out in the prospectus. Excluding the area of land occupied by squatters who built houses before 1947 (as appears from Exhibit P3) from the total area of Thomson Rise Estate, one should be able to arrive at the area of land which is capable of development. This area should be valued as at 20th August, 1963 and the annual value to be entered on the valuation list should be five per centum of the value so arrived at and I accordingly direct that this should be done.

The appeal partially succeeds to this limited extent. I am prepared to hear submissions on costs.

Appeal partially allowed.

GALAU & ORS. v. PENGHULU IMANG & ORS.

[A.C.J. (Williams J., Penghulu Jinggut and Anyaw, Assessors) December 10, 1966]

[Sibu — Native Court of Appeal No. 3 of 1966]

Custom — Native Custom — Temuda rights — Nature of rights — Whether affected by administrative boundaries — Whether rights can be affected by agreement.

This case arose out of a dispute as to *temuda* rights bordering along the boundary between the Sibu and Mukah district areas, which were affected by the construction of a new road. The questions referred for the determination of the Native Court of Appeal were (1) whether the administrative boundary between the Sibu and Mukah districts have any relevance in determining native customary rights over land; (2) whether a Native Court has jurisdiction to decide questions of customary rights over land by reference to an agreement between the parties or their predecessors.

Held: (1) the administrative boundary has no relevance to the creation and holding of *temuda* rights, that is rights to farm over Crown land cleared by the tribes;

(2) *temuda* rights can be affected by agreements between the parties but each case must be considered separately and on its merits.

(3) a native court has jurisdiction to decide questions of customary rights over land by reference to an agreement between the parties or their predecessors.

Cases referred to:—

(1) *Udin anak Lampon* v. *Tuai Rumah Utom* [1949] S.C.R. 3.

(2) *Sumbang anak Sekam* v. *Engkarong anak Ajah* [1958] S.C.R. 95.

(3) *Sat anak Akum & Anor.* v. *Randong anak Charareng* [1958] S.C.R. 104.

(4) *T. R. Bujang anak Guntor* v. *T. R. Tanjong anak Usat*, (Sibu Native Court of Appeal Case No. 2 of 1966).

NATIVE COURT APPEAL.

Chew Peng Cheng for the appellants.

Respondents in person.

Williams J.: This case has arisen out of dispute as to the *'temuda'* rights bordering along the boundary between Sibu District Area and Mukah District Area in the 3rd Division; rights which are affected it seems by the construction of a new road.

It is not clear how the matter came before the District Native Court where it was first heard but it appears that what started out as an enquiry into the rights over an individual area of

'*temuda*' land became a general action the crux of which was whether the 'Oyah Iban' under the 'jurisdiction' of Penghulu Imang could farm '*temuda*' land under the 'jurisdiction' of Penghulu Poh. Or in other words whether the Iban whose houses are in the Oyah Administrative District could hold '*temuda*' rights in the Sibu Administrative District, and particularly the Ulu Pasai Siong.

The whole dispute between the two groups of people involved turns on whether there was an agreement entered into during the Japanese occupation between Penghulu Kaya of the 'Sibu Iban' and Penghulu Imban of the 'Oyah Iban' which demarcated their respective areas along the line dividing the two administrative districts. The effect of this agreement so say the 'Sibu Iban' is that any rights then held by the 'Oyah Iban' in their area were abandoned, or forfeited, and thus no '*temuda*' land in the Sibu Administrative Area can now be theirs.

The 'Oyah Iban' deny any such agreement and claim that as their ancestors felled the original jungle and farmed the land the '*temuda*' rights thus created are theirs.

The District Native Court decided that, (a) the administrative boundary as such was of no relevance in that of itself it created no legal bar against anyone; and (b) that there was no sufficient evidence of any agreement between the two Penghulus delimiting the land which could be farmed by their respective communities. The court then decided that in these circumstances ordinary customary principles must apply. Those principles were set out as follows:—

"It is always recognised under native customs that whoever fells the primary jungle and cultivates thereon, established a customary right. Therefore following this custom all those who felled the primary jungle and cultivated thereon regardless of where they came from have a customary right over the *temuda* or respective *temuda*."

From this decision the 'Sibu Iban' appealed to the Resident's Native Court. That court dismissed the appeal and in particular held that (a) administrative boundaries were not germane to the issue, and (b) that the law relating to the creation and holding of '*temuda*' is as set out by the lower court.

Subsequently on an appeal being again lodged the Resident stated a case for the consideration of this court.

The points of Native custom upon which an opinion is sought are as follows:—

(a) whether the administrative boundary between Sibu and Mukah Districts has any relevance in determining native customary rights over land;

(b) whether a Native Court has jurisdiction to decide questions of customary rights over land by reference to an agreement between the parties or their predecessors (should one be proved to exist) defining the boundary between the two communities.

As at present advised this court is unanimous in the opinion that the administrative boundary as such has no relevance to the creation and holding of '*temuda*' land. It is not clear how these boundaries first came into being but that they can be changed is not to be denied. It is difficult to see therefore why rights over land should be created or lost thereby. That they may be, indeed are, used as useful guides by Iban communities is another matter.

The answer to the first question then is, no.

The second point raised is one which has caused considerable difficulty. The two Native members of the court, Penghulu Jinggut M.P., and Mr. Anyaw, are quite adamant that the answer is in the affirmative. In other words they are firmly of the opinion that Iban may delimit the areas in which they as members of any one community may hold '*temuda*' rights over land. They are equally adamant that such an agreement when made may extinguish existing rights.

That there are territorial areas within which rights may be held, or rather retained, cannot be doubted. Indeed Penghulu Imang, the representative of the 'Oyah Iban', admitted that such an agreement, as here claimed, if made could prevent the creation of 'new' '*temuda*'. (He disputed however that '*temuda*' rights already created could be lost thereby).

There is ample judicial authority to this effect. The leading case is that of *Udin anak Lampon* v. *Tuai Rumah Utom.*[1] In that case Hedges C.J. said:—

"By an order dated 10th August, 1899, the Rajah declared that any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others farming thereon, unless he holds such land under a grant. The order was declaratory of the customary law, and although the order itself is no longer on the Statute Book the force of the customary law is in no way diminished."

Then there is the case of *Sumbang anak Sekam* v. *Engkarong anak Ajah,*[2] where, *inter alia,* it was decided that if the holder of individual rights moves from a longhouse but remains within the same Penghulu's jurisdiction he continues to retain in full such farming rights provided his move does not take him beyond a "reasonable farming distance" from the land.

In the case of *Sat anak Akum & Anor.* v. *Randong anak Charareng,*[3] a decision of the Court of Appeal, Lascelles J., a man much versed in Iban law and custom, had this to say:—

"The next question to consider is that of '*temuda*' land. To put it as simple as possible these '*temuda*'

rights are rights to farm over Crown Land and are a form of customary tenure; the holders are mere licensees of the Crown, but it has been my experience that this is difficult to explain to Dayaks in general and they regard it as land owned by them. *Temuda* rights are created only for the use of the original worker, his heirs and descendants. They certainly cannot be transferred for value. If the 'owner' leaves the district the land reverts to the longhouse for communal use under the authority of the *Tuai Rumah* who can allocate the land to anyone in the house who he considers most needs the land. This of course only applies if there are no heirs remaining in the district. If such do remain then they take over the use of the land. If ever the 'owner' returns to the district he can resume the use of the land. The 'owner leaving the district without any heirs to take over the land may arrange for someone else to have the prior right to farm that land by taking from him what is called *'tungkus asi'*, which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the *'tungkus asi'* are inheritable by the heirs of that person but revert to the original owner if he returns, or to his heirs if they return."

A further and important case is that of *T. R. Bujang anak Guntor* v. *T. R. Tanjong anak Usat.*[4] It is important in that there it was recognised that longhouse communities can agree to boundary lines which will prevent members from acquiring *'temuda'* rights in each others area.

That these decisions are not exhaustive of the law is clear. They must necessarily have been governed by the particular facts before the court and the form of the questions posed for consideration. But the constant reference to district, river and *Penghulu's* jurisdiction and to the creation and loss of rights is abundant authority for the point at issue.

There is no direct authority for the proposition that *temuda* rights once established may be lost by the drawing of a boundary. Indeed the case of *T. R. Bujang anak Guntor* v. *T. R. Tanjong anak Usat, supra,* may appear to be somewhat against such a possibility. But in that the land in question was within the jurisdiction of one *Penghulu,* a point very material to the decision, it may be inferred that the rights in question may well have been lost if as here the area involved was within the jurisdiction of another *Penghulu.* The view of this court is that the *temuda* rights could have been so adversely affected.

The answer to the second question posed therefore is, yes.

What rights a 'Sibu Iban' could have over *temuda* abandoned, or forfeited, by the Oyah Iban remains a moot point. If such person cannot establish any right over that land by virtue of the agreement itself or by any other customary usage it remains of course unencumbered State land and there cannot be any question of his having any claims to 'compensation' from Government, a point very much in the mind of both parties.

This court feels that on the evidence there is a strong possibility that there was some agreement between Penghulu Kaya and Penghulu Imban and that further evidence should be sought thereon. The terms of such agreement would of course have to be clearly established particularly the terms of any provision providing for the loss of *'temuda'* rights already in existance.

However from what has been said it is clear that each claim must be considered separately and in that that was not done here there is no point in ordering a retrial.

This court therefore makes no further order and each claim to *'temuda'* land must be dealt on its merits, but with regard to the answers here given to the questions posed by the Resident Native Court.

It should be noted that the court has confined itself in this case to a consideration of the rights to farm *'temuda'* land. Different consideration apply to the right to receive the benefit of fruit and rubber trees. Both Penghulu Jinggut and Mr. Anyaw are adamant that no agreement between communities could deprive an individual and his heirs to their 'property' in such trees. Those trees remain his until they wither and die.

Penghulu Jinggut and **Anyaw,** assessors, concurred.

GOVERNMENT OF MALAYSIA v. THELMA FERNANDEZ & ANOR.

[O.C.J. (Raja Azlan Shah J.) December 14, 1966]

[K.L. — Civil Suit No. 292 of 1966]

Contract — Scholarship agreement — Whether stipulation in agreement to refund on breach of agreement of all monies paid in respect of student's course of training a penalty.

The plaintiff claimed damages for breach of a scholarship agreement entered into between the plaintiff and a student, with the defendants as sureties. The defendants denied that the student had committed a breach of the agreement and also alleged that the provision in the agreement for the refund of all monies which had been paid by the plaintiff in respect of the student's course of training is a penalty and therefore not refundable.

Held: (1) on the facts the student had left the service of the plaintiff without their approval and consent and had therefore committed a breach of the agreement;

(2) the damages stipulated for in this agreement was not extravagant or unconscionable and therefore was not a penalty.

Cases referred to:—

(1) *Public Works Commissioner* v. *Hills* [1906] A.C. 368, 375.

(2) *Dunlop Pnuematic Tyre Co.* v. *New Garage & Motor Co.* [1915] A.C. 79.